

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

MICHAEL D. WOLFE,	)	
	)	
Plaintiff,	)	4:06CV3146
	)	
v.	)	
	)	
MICHAEL J. ASTRUE,	)	MEMORANDUM AND ORDER
Commissioner of the Social	)	
Security Administration,	)	
	)	
Defendant.	)	

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Pursuant to the parties' consent, this case is pending before me for final disposition.<sup>1</sup> The plaintiff, Michael D. Wolfe ("Wolfe") has appealed the decision of the defendant, Michael J. Astrue,<sup>2</sup> the Commissioner of the Social Security Administration ("Commissioner"), denying his request for social security disability insurance benefits and supplemental security income benefits. After carefully reviewing the record, I conclude that the Commissioner's decision should be affirmed.

I. PROCEDURAL BACKGROUND

Wolfe applied for social security disability benefits on March 9, 2004. Wolfe claims depression, anxiety disorder NOS, degenerative joint disease, and a history of polysubstance abuse in remission rendered him disabled and unable to work since

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<sup>1</sup>See filing 5, "Consent to Exercise of Jurisdiction by a United States Magistrate Judge."

<sup>2</sup>On February 12, 2007, Michael J. Astrue became the Commissioner of Social Security. Michael J. Astrue should be substituted for Commissioner Jo Anne B. Barnhart as the defendant, (Fed.R.Civ.P. 25(d)(1), and this suit shall proceed pursuant to the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

January 11, 2004. AR 66-68. His application for disability benefits was denied initially on July 7, 2004, (AR 29-32), and upon reconsideration on September 2, 2004. AR 35-39.

Wolfe filed a hearing request on October 6, 2004, (AR 40), and the hearing was held before an Administrative Law Judge ("ALJ") in Grand Island, Nebraska on August 22, 2005. Testimony was received from Wolfe, and from a vocational expert and a medical expert who appeared at the ALJ's request. AR 12, 57-65, 282. The ALJ's adverse decision was issued on December 30, 2005, (AR 12-24), and Wolfe's request for review by the Appeals Council was denied on April 27, 2006. AR 4-6. Wolfe's pending complaint for judicial review and reversal of the Commissioner's decision was timely filed on June 19, 2006. Filing 1 (Complaint).

## II. THE ALJ'S DECISION.

The ALJ's decision evaluated Wolfe's claims through all five steps of the sequential analysis prescribed by 20 C.F.R. §§ 404.1520 and 416.920. AR 12-24. The ALJ made the following findings:

1. Wolfe met the special earnings requirements under Title II of the Social Security Act on January 11, 2004, and continues to meet them;
2. Wolfe has not engaged in substantial gainful activity since January 11, 2004;
3. The record establishes that Wolfe has depression, an anxiety disorder NOS, degenerative joint disease, and a history of polysubstance abuse in remission;
4. Although Wolfe's medically determinable impairments, either singly or collectively, impose some limitations upon his ability to perform work-related functions, they have not revealed the same or equivalent attendant

medical findings as are recited in Appendix 1 to Subpart P of the Social Security Administrations' Regulation No. 4. Specifically, the ALJ found that Wolfe should avoid exposure to concentrations of vibration, cold and noise, and is moderately limited in his ability to:

- respond to change in the work setting;
- get along with co-workers and peers without being distracted or exhibiting behaviorial extremes;
- complete a normal work day or work week without distractions from psychologically based symptoms;
- perform at a consistent pace without an unreasonable number and length of rest periods;
- work in proximity to others without distraction; and
- maintain attention and concentration for extended periods of time.

The ALJ noted that while Wolfe claimed to suffer from a significant military-related hearing loss, he was able to hear the ALJ throughout the hearing without wearing hearing aids. The ALJ found Wolfe remains able to:

- occasionally lift and carry up to 20 pounds;
- frequently lift and carry 10 pounds;
- sit, stand, and walk for up to 6 hours in an 8-hour work day with normal breaks;
- work an 8-hour day;
- work without extremity mobility limitations in either his left or right hand;
- occasionally bend, stoop, and squat; and
- remember, understand, and carry out simple but not detailed instructions.

5. Due to the limitations caused by his medically determinable impairments, Wolfe is unable to perform his past relevant work as a baker/dough divider.
6. Despite his medically determinable impairments, Wolfe possess the residual functional capacity for other work that exists in the regional and national economies in significant numbers.
7. To the extent he attempted to establish total disability through hearing testimony, Wolfe was not credible;
8. Wolfe is not disabled, as that term is defined under the Social Security Act;
9. Wolfe is not entitled to a period of disability or to the payment of disability insurance benefits under Title II of the Social Security Act;
10. Wolfe is not eligible for the payment of supplemental security income benefits under Title XVI of the Social Security Act.

AR 22-24.

### III. ISSUES RAISED FOR JUDICIAL REVIEW.

Wolfe's complaint requests judicial review of this decision. He raises the following arguments in support of his claim for reversal of the Commissioner's determination:

- The ALJ failed to accept as controlling the limitations and restrictions placed upon the plaintiff by his treating physician, Michael G. Skoch.
- The ALJ failed to give the opinions of Dr. Skoch the greatest weight based on his examining relationship, his treatment relationship, frequency of treatment and the nature of the treatment, the supportability of his opinions, and their consistency with the record as a whole.
- The ALJ failed to develop a thorough record.

- The ALJ failed to properly assess the plaintiff's testimony as required under Polaski v. Heckler, 739 F.2d 1320 (8<sup>th</sup> Cir. 1984) when determining the credibility of the plaintiff's subjective complaints.

Filing 11 (Claimant's brief), p. 5.

In response, the Commissioner argues that although Dr. Skoch is a treating physician, his opinions were not entitled to controlling weight or substantial deference because they were internally inconsistent, were inconsistent with plaintiff's self-reported symptoms, and were based on examinations performed only twice a year. The Commissioner claims the record was adequately developed with regard to those conditions forming the basis of plaintiff's claimed disability, and therefore the ALJ was not obligated to order further examinations and tests of plaintiff's intellect and memory. Finally, the Commissioner argues the ALJ properly evaluated the plaintiff's credibility, and since this credibility determination is supported by the record as a whole, the ALJ's decision should be affirmed.

#### IV. THE RECORD AND PROCEEDINGS BEFORE THE ALJ.

At the time of his hearing, Wolfe was fifty-four years old. He had graduated from high school, was able to read, write, and speak English, and was able to handle his own finances. AR 272, 293, 295-96. From 1990 until January 2004, Wolfe worked as a dough divider for Sara Lee Bakery. AR 296.

Wolfe claims his disability began on January 11, 2004. AR 272. Wolfe entered substance abuse treatment at Valley Hope on January 12, 2004 and was released to outpatient care on February 13, 2004. AR 154-5, 307. His Global Assessment of Functioning

("GAF") when he entered the program was 38.<sup>3</sup> AR 154-5. MMPI-2 testing was performed on January 14, 2004, January 30, 2004, and February 16, 2004. The January 14 testing was likely invalid, and the February 16 testing was "probably caused by exaggeration of symptoms due to a cry for help or possible malingering." AR 163, 171. The January 30, 2004 testing revealed a valid profile for clinical depression, with symptoms of anxiety, guilt, and moodiness. AR 167.

Wolfe began receiving chiropractic care for pain and stiffness in his neck and low back pain in February of 1988. AR 178. On February 25, 2004, he saw Dr. John L. Worden, IV for complaints of pain and stiffness in his joints. Doctor Worden noted Wolfe was sitting up "in no acute distress," "has only about 3 or 4 of the fibromyalgia tender points," and "has no significant tenderness of his lumbar spine or cervical spine where he complains of pain." AR 253. Dr. Worden prescribed Zoloft and Zyprexa for Wolfe's complaints of depression, and Lisinopril for his high blood pressure. He was advised to use Tylenol and sports creme for his pain. AR 253.

Wolfe received a mental health evaluation at the Moscati Health Center on February 27, 2004. Wolfe stated he was "currently working on getting disability at SSI," . . . "but will

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<sup>3</sup>Global assessment of functioning (GAF) is the clinician's judgment of the individual's overall level of functioning, not including impairments due to physical or environmental limitations. A GAF of 31 through 40 is characterized by some impairments in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major impairments in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g. depressed man avoids friends, neglects family, and is unable to work. . . ). See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, at 34 (4<sup>th</sup> ed. 2000)("DSM-IV-TR")

be going back to work in a couple of weeks." AR 176. Wolfe explained he was scheduled to return to work at Sara Lee on March 12, and though "he doesn't like the people at work," "they demand perfectionism," and "his body is wore out," "it's a good job." AR 177. Wolfe's GAF at the time of his February 27, 2004 evaluation was 55.<sup>4</sup>

A consulting psychological evaluation was performed by Alan J. Smith, Ph.D. on May 4, 2004. Though Wolfe presented with hypomania, possibly methamphetamine-induced or a symptom of premorbid bipolar disorder, his GAF was 52. Wolfe reported to Dr. Smith that his symptoms were managed fairly well with medication. Dr. Smith concluded that despite some limitations in occupational capabilities, Wolfe continued to have several occupational skills that have historically rendered him able to engage in long-term employment. He opined that Wolfe's prognosis for occupational adaptation was fair to good since his medications were successfully managing his mood disorder, noting that an updated review of Wolfe's medications was probably warranted. AR 179-85.

Dr. Frederick Catlett performed a consulting medical examination of Wolfe on May 5, 2004. Dr. Catlett noted that Wolfe has osteoarthritic changes in the spine and that past injuries had caused a shortened left leg and a deformed second toe on Wolfe's right foot. However, Wolfe was not using any

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<sup>4</sup>A GAF of 51 through 60 is characterized by moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with peers or coworkers). See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, at 34 (4<sup>th</sup> ed. 2000) ("DSM-IV-TR").

brace, crutch, or wheelchair to ambulate. Although Wolfe complained of "fibromyalgia," back and neck pain, and hip dislocations, upon thorough examination by Dr. Catlett, Wolfe ambulated well during the exam and was able to lie down, sit up, and climb off and on the examination table without problems. Dr. Catlett palpated Wolfe's shoulders, upper back, anterior thigh, and hips, but Wolfe could not identify any trigger point he considered unusually tight, tender, or painful. During the course of the examination, Wolfe told Dr. Catlett that he cleans and vacuums his home, mows the yard twice a week (one to one and a half hours each time), and maintains a "fair-size" vegetable and flower garden. Dr. Catlett noted Wolfe had a fairly dark tan on his chest and back from being outdoors. AR 187-93.

On May 24, 2004 Wolfe contacted Dr. Worden's office for renewal of his Zoloft prescription. In response to this request, Dr. Michael Skoch performed a "med check" examination of Wolfe's "bipolar affective disorder and anxiety" on May 28, 2004. Dr. Skoch noted Wolfe was a bit anxious, but was alert, oriented, and appropriate, with no evidence of psychotic thinking, hallucinations, or delusions. AR 253. Wolfe's prescriptions were renewed, including a prescription for Naprosyn. Wolfe was scheduled to see Dr. Worden on June 30, 2004, but failed to keep this appointment. AR 253.

On October 20, 2004, Wolfe was examined by Tami Belz, APRN<sup>5</sup> to recheck his medications. At that time, Wolfe reported that he "feels dumpy all the time" and has fibromyalgia. The treating medical provider observed that Wolfe was alert and in no acute distress. Though he complained of body aches, no pain was

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<sup>5</sup>Advanced Practice Registered Nurse. See Neb. Rev. Stat. § 71-17,131 et. seq.



elicited upon palpation. Wolfe's Zoloft and Zyprexa prescriptions were discontinued and replaced with Symbyax and Wellbutrin, and his Naprosyn and Lisinopril prescriptions renewed. Wolfe was advised to return in three weeks for a followup appointment--sooner if problems or concerns arose. AR 252.

Wolfe returned two weeks later and was examined by APRN Belz for a recheck of his medications. In response to Wolfe's continuing complaints of anxiety, his Symbyax prescription was increased.

Wolfe saw Dr. Skoch on November 19, 2004 for a mental capacities evaluation and disability assessment. See AR 238-47, 252. Dr. Skoch concluded "I don't believe Mr. Wolfe could function adequately to work full-time. His distractability, fatigue, and anxiety would prevent full-time employment." AR 244. Dr. Skoch's physical capacities evaluation of Wolfe stated Wolfe could work 40 hours a week and noted that "[from a physical capacity standpoint, Mr. Wolfe has few significant limitations apart from his subjective complaint of pain from his fibromyalgia." AR 235-37. At his disability hearing, Wolfe testified that he sees Dr. Skoch twice a year. AR 311. In completing the Mental Impairment and Medical Impairment Evaluation forms for Wolfe, Dr. Skoch acknowledged that he had not seen Wolfe on a regular basis. AR 232, 238. Based on the record before me, Dr. Skoch did not see, treat, or evaluate Wolfe after November 19, 2004.

Wolfe was again seen on December 8, 2004 by APRN Belz for a medication recheck. He reported that his medications were working well, although he still felt anxious in the evening. He

requested additional medication to help him relax, and his Symbyax prescription was again increased. AR 251. Wolfe reported that he was in the process of actively searching for a job. AR 270. However, in a letter to Wolfe's counsel dated December 9, 2004, Wolfe's mental health counselor, Virginia White,<sup>6</sup> opined that "[q]uite frankly, in this condition, I do not see that he would be able to hold much of a job, in fact, a part time job might not even work out for him." AR 228.

The December 2004 medication changes were apparently helpful in treating Wolfe's anxiety. On January 7, 2005, Wolfe reported to Ms. White that he believed he would be hired by the new Super Wal-Mart when it opened its bakery department. AR 269. In fact, he began that job in late January, and worked full-time for Wal-Mart until April 8, 2005. When Wolfe was treated by APRN Belz for an infected toe on February 3, 2005, he reported that "since his Symbyax was increased in December that he does feel improved." AR 251. However, his Wellbutrin prescription was increased four days later when, during a recheck of the infected toe, he claimed his main concern was that he feels "dumpy and depressed" and "always sluggish." As of late March 2005, he was reportedly "much more relaxed than [] he has been in a long time." AR 264.

Wolfe did not, however, like his job at Wal-Mart because he did little baking, a lot of cleaning, and had to work in a confined space. AR 263-64. He worked long hours at Wal-Mart getting ready for its grand opening. He stated "he wished he had signed up for a Greeter instead of the doughnut job," that "he has to get up at 3:00 a.m. now and go to work and make

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<sup>6</sup>Virginia K White RN, MS, EDS is a Licensed Mental Health Practitioner (LMHP). See AR 228; Neb. Rev. Stat. § 71-1,308.

doughnuts," "everything has to be so clean," he will have to "cross train to do cakes as well," and he hoped he was able to do the job. AR 255. He stated did not like some of Wal-Mart's rules, but had to follow them. AR 255.

Wolfe quit the Wal-Mart job on April 8, 2005, reportedly because he "was overwhelmed and knew he was too stressed out to continue working there. He had become more depressed and felt he had no choice." He stated, "I hope I made the right decision, but I just couldn't do it anymore." AR 262. He also complained to his counselor of memory loss, stating he could not learn all the policies and procedures required by Wal-Mart. AR 262, 259. At his disability hearing, Wolfe testified that he quit the Wal-Mart job because it required too much bending and stooping, was too high paced, there was too much to remember, and he believed he would ultimately be fired if he attempted to stay. AR 306, 309.

At the outset of his counseling appointment on May 25, 2005, Wolfe asked whether his counselor had remembered to write a letter to his attorney in support of his social security disability claim. AR 259. Ms. White's letter, dated June 6, 2005, states he quit his job at Wal-Mart due to anxiety and panic attacks, and his inability to pass Wal-Mart's required testing on policies and procedures. AR 248. The letter states she was continuing to work with Wolfe to reduce his anxiety and bolster his self-esteem. When Wolfe saw APRN Belz on May 27, 2005, he stated he did not believe Wellbutrin was working because he was very anxious and jittery at the time. His medications were again adjusted, to include discontinuing the Wellbutrin prescription. AR 250.

At his disability hearing, Wolfe testified that he can no longer work because he has fibromyalgia, with pain in his neck, back and joints, and swelling in his hands and feet. Wolfe also testified that he is unable to concentrate and experiences memory loss. AR 296-7. Wolfe testified that he takes 1000 milligrams of Naprosyn twice a day, Wellbutrin, Symbyax, 20 milligrams of Zyprexa a day, 15 milligrams of Prozac a day, and Lipitor. AR 299. His only side effect from these medications is "cotton mouth" and "kind of a phelgmy throat." AR 299-300.

Wolfe testified that he gets out of bed between 8:00 and 9:00 a.m., does household chores such as laundry and the dishes, and then rides bikes and lifts weights. He experiences pain if he lifts more than 40 pounds. Wolfe testified that he can walk around the block, but if he walks further, he develops swollen feet and aching in his back, knees, and feet. AR 300. He states he cannot stand for six or seven hours without pain, and he becomes stiff and achy if he sits more than an hour, so he spends three to four hours a day lying down or in a reclined position in addition to the time he spends sleeping at night. AR 300-02. Wolfe testified that he can reach forward and grasp, but cannot repetitively do so for more than 10 or 15 minutes without pain; can grasp a cup of coffee, but his hands swell; and can pick up small objects such as paper clips, but can only do so repetitively for five to ten minutes without stiffness in his fingers and pain in his shoulders and elbows. AR 301-02. Though he still does some painting and bicycling, Wolfe testified that he has lost interest in most other hobbies due to pain. AR 302.

Wolfe testified that he has difficulty with concentration and memory, though he stated he could follow simple instructions

(one or two-step instructions), and could not explain any real examples of how memory and concentration difficulties affected his daily life. AR 303-04. He explained that he is nervous around groups of people, and does not handle work stress well. He claims he is overwhelmed and experiences panic attacks when performing high-paced jobs or when job changes occur, but he is bored by routine and repetitive tasks. AR 304-6.

Dr. Thomas England, a licensed clinical psychologist who attended the hearing at the request of the ALJ, testified that although Wolfe complains of memory loss and confusion, based on his records, he never underwent IQ or memory testing. AR 46-53, 315. He testified that Wolfe has a depressive disorder. Dr. England noted that several medical records state he has bipolar disorder, but the origin of that diagnosis was unclear, and there were no symptoms of hypermania described in the records, perhaps because Wolfe's symptoms were well controlled by medication. AR 316-17, 319. In response to Dr. England's questioning, Wolfe acknowledged that he has never experienced episodes of high energy or excessive spending, and stated his energy level was consistently low. AR 310-12. Dr. England testified that although Wolfe's treatment records did identify symptoms of anxiety, the precise diagnostic cause of these symptoms was unclear and his prescribed medications were not typically used as anti-anxiety medications. AR 318. Though Wolfe had a clear history of prior drug abuse, substance addiction was not material to any finding of disability because Wolfe was no longer using illegal drugs and alcohol. AR 318-19.

The ALJ asked the vocational expert to assume someone with Wolfe's age, education and work experience could lift up to 20 pounds occasionally and 10 pounds frequently; sit or stand for

six hours and day and, with normal breaks, complete an eight-hour day; bend, stoop, kneel, and squat on an occasional basis; use his left and right hands without limitations; and understand and carry out simple instructions but not detailed instructions. The ALJ asked the vocational expert to further assume Wolfe must avoid exposure to concentrated vibration, cold and noise, and is moderately limited (limited but still able to function satisfactorily) in his ability to:

- respond to changes in the work setting;
- get along with co-workers or peers without distracting them or exhibiting behavioral extremes;
- complete a normal work day and work week without interruptions from psychologically based symptoms;
- perform at a consistent pace without unreasonable number and length of rest periods;
- work in coordination with or proximity to others without being distracted by them; and
- maintain attention and concentration for extended periods of time

AR 322. The assumptions and restrictions set forth in the hypothetical question posed to the vocational expert were entirely consistent with the results of Wolfe's Mental and Physical Functional Capacity Assessments performed in June and July of 2004. AR 196-201; 219-26. Though Wolfe had also commented that he had a hearing loss, the ALJ noted that Wolfe did not have hearing aids and had no difficulty hearing during the disability proceeding. AR 321-22.

Based on the assumptions and restrictions in the hypothetical question, the vocational expert opined that Wolfe could not return to his past relevant work. AR 322. However,

she further testified that he remains able to perform other positions within the national economy, such as a folding machine operator (550 regional positions and 10,000 positions nationally), photocopy machine operator (500 regional positions and 11,000 positions nationally), or a housecleaner or maid (4300 regional positions and 100,000 positions nationally). AR 322-24.

Relying on this testimony, the ALJ denied Wolfe's claim for disability.

## V. ANALYSIS

Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), provides for judicial review of a "final decision" of the Commissioner under Title II, which in this case is the ALJ's decision. A denial of benefits by the Commissioner is reviewed to determine whether the denial is supported by substantial evidence on the record as a whole. Hogan v. Apfel, 239 F.3d 958, 960 (8th Cir. 2001). "Substantial evidence is relevant evidence that a reasonable mind would accept as adequate to support the Commissioner's conclusion." Maresh v. Barnhart, 431 F.3d 1073, 1074 (8th Cir. 2005); Goff v. Barnhart, 421 F.3d 785, 789 (8th Cir. 2004)(quoting Young v. Apfel, 221 F.3d 1065, 1068 (8th Cir. 2000)). Evidence that both supports and detracts from the Commissioner's decision must be considered, but the decision may not be reversed merely because substantial evidence supports a contrary outcome. Id. See also Moad v. Massanari, 260 F.3d 887, 890 (8th Cir. 2001).

### 1. Failing to Properly Evaluate and Rely on the Treating Physician's Opinions.

Wolfe claims the ALJ's disability finding and his hypothetical question posed to the VE were inconsistent with the

opinion of his treating general practitioner, Dr. Skoch. "A treating physician's opinion should not ordinarily be disregarded and is entitled to substantial weight." Singh v. Apfel, 222 F.3d 448, 452 (8<sup>th</sup> Cir. 2000). If a treating physician's opinion is well supported by medically acceptable clinical techniques and is not inconsistent with the other substantial evidence in the record, the opinion should be given controlling weight. Id. Moreover, even if the ALJ concludes the treating source's medical opinion is not entitled to controlling weight, it may still be entitled to deference and be adopted by the adjudicator. SSR 96-2p, 1996 WL 374188 at \*1 (S.S.A., July 2, 1996). However, a treating physician's opinions must be considered along with all the evidence, and when those opinions are inconsistent or contrary to the medical evidence and record as a whole, they are entitled to less weight. Kroegmeier v. Barnhart, 294 F.3d 1019, 1023 (8<sup>th</sup> Cir. 2002).

The regulations require the ALJ to set forth "good reasons in the notice of the determination or decision for the weight given to a treating source's medical opinion(s), i.e., an opinion(s) on the nature and severity of an individual's impairment(s)." SSR 96-2p, 1996 WL 374188 at \*5. Factors to be considered are: (1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship (such as the kinds and extent of examinations and testing); (3) supportability of the opinion (the more a source presents evidence such as medical signs and laboratory findings, the more weight will be given that source's opinion); (4) the consistency of the opinion with the record as a whole; and (5) whether the physician is a specialist, as more weight is given to the opinion of a specialist about medical issues relating to the area of specialty than to the opinion of a



source who is not a specialist. 20 C.F.R. §§ 404.1527(d) and 416.927(d). See also SSR 96-2p, 1996 WL 374188 at \*4.

The ALJ determined that "[t]o the extent that the forms filled out by Dr. Skoch indicate [Wolfe] would not be able to perform any work activity, they are not given significant weight." AR 20. The ALJ explained:

[Dr. Skoch] only sees the claimant a couple of times a year for prescription renewal and noted on these forms that he does not see the claimant on a regular basis. For the most part, the doctor only gives moderate limitation and the forms are inconsistent. On one form he indicates that the claimant could work a full 40 hour work week and on another he indicates he couldn't work full-time. He notes "situations with moderate or high stress would be taxing for Mr. Wolfe. He is easily disturbed, becomes anxious, nervous, fidgety." The undersigned has taken into consideration the effect of stress on the claimant. Dr. Skoch also noted that the claimant could understand, remember and carry out simple instructions. The diagnosis of fibromyalgia is questionable and Dr. Skoch noted "From a physical capacity standpoint, Mr. Wolfe has few significant limitations apart from his subjective complaint of pain from his fibromyalgia.

AR 20.

The ALJ's conclusion that Dr. Skoch's opinions were not entitled to controlling or substantial weight is fully supported by the record. Dr. Skoch had very little direct contact with Wolfe--the majority of Wolfe's appointments were for medication rechecks and were handled by an APRN and not Dr. Skoch. Lack of contact between a patient and treating physician is a relevant factor in assessing the weight of the physician's assessment of function, and especially so when, as in this case, determining the nature and extent of the patient's alleged disabilities

relies substantially on assessing whether his subjective complaints of pain and mental incapacity are credible.

Dr. Skoch concluded in November 2004 that due to Wolfe's tendency to be distracted, fatigued, and anxious, he would not be able to work fulltime. AR 244. However, while a "claimant's residual functional capacity is a medical question," Lauer v. Apfel, 245 F.3d 700, 704 (8<sup>th</sup> Cir. 2001)), "statements that a claimant could not be gainfully employed 'are not medical opinions but opinions on the application of the statute, a task assigned solely to the discretion of the [Commissioner].'" Cruze v. Chater, 85 F.3d 1320, 1325 (8<sup>th</sup> Cir. 1996)(quoting Nelson v. Sullivan, 946 F.2d 1314, 1316 (8<sup>th</sup> Cir. 1991)). See Brosnahan v. Barnhart, 336 F.3d 671, 676 (8<sup>th</sup> Cir. 2003) (ALJ properly discounted psychologist's opinion that claimant could not work); Krogmeier v. Barnhart, 294 F.3d 1019, 1023 (8<sup>th</sup> Cir. 2002) (psychiatrist's opinion that claimant could not be gainfully employed was not a medical opinion); Flynn v. Chater, 107 F.3d 617, 622 (8<sup>th</sup> Cir. 1997)(physician's opinion that claimant "may not be able to work in a competitive employment situation" not given weight).

Moreover, Dr. Skoch's November 2004 opinion is substantially, if not completely, undermined by Wolfe's work history. Before receiving drug abuse treatment, Wolfe successfully worked fulltime for fourteen years despite his chronic mental health problems and methamphetamine addiction. After securing Dr. Skoch's written disability evaluations in November 2004, Wolfe became a full-time employee for Wal-Mart. There is nothing of record to explain the discrepancy between Dr. Skoch's opinion and Wolfe's demonstrated ability to work. Though Wolfe claims he resigned from Wal-Mart due, in part, to his

alleged inability to remember company policies and procedures, Dr. Skoch placed no significant limits on Wolfe's ability to remember and understand work instructions and procedures. AR 241.

To the extent that the ALJ refused to accept Dr. Skoch's conclusion that Wolfe's physical and mental disabilities rendered him unable to work, I conclude the ALJ provided adequate "good reasons" for disregarding this opinion. I therefore conclude the ALJ's determination is not subject to reversal for failing to give controlling or substantial weight to the opinion of Wolfe's treating physician, Dr. Skoch, or for failing to adequately explain why such weight was not given.

2. Failure to Develop the Record.

Wolfe claims the ALJ's determination must be reversed because he failed to order additional testing and examinations of Wolfe. Medical expert, Dr. Thomas England, testified:

I'm going to have a little bit of difficulty with precise diagnosis in some areas. One thing I would note is that testimony and the medical record both indicate complaints in the area of memory problems and confusion. And I don't find any evidence of there having been IQ testing or memory testing done, which appears to be his main complaints. And so I don't have anything in the way of standardized information about those abilities. If that is important, why then some standardized testing may be advisable.

AR 315 (emphasis added). The report of consultative examiner, Dr. Alan Smith states that at the time of Wolfe's May 2004 examination, Wolfe stated that "he did not take his medications on the day of the evaluation, so that this psychologist could observe the problems with which he is struggling." Dr. Smith

stated Wolfe was "clearly hypomanic as described earlier, . . . thought blocking is also revealed, . . . [and] Wolfe demonstrated considerable problems with organizing his thoughts." AR 182. Dr. Smith opined, "[I]t is difficult to determine the extent to which bipolar disorder, methamphetamine-induced mood disorder or an interaction between the two accounts for current behaviors." AR 183.

Wolfe argues that "[s]ince the ALJ failed in his duty to develop the record by ordering memory and I.Q. testing and/or another consultative examination, the case should be remanded for further testing of the plaintiff." Filing 11 (Wolfe brief), p. 12. "The Eighth Circuit has consistently held that the ALJ has the 'duty to develop the record fully and fairly,' even where the claimant is represented by counsel. Freeman v. Apfel, 208 F.3d 687, 692 (8<sup>th</sup> Cir.2000); Dozier v. Heckler, 754 F.2d 274, 276 (8<sup>th</sup> Cir. 1985); Vaughn v. Heckler, 741 F.2d 177, 179 (8<sup>th</sup> Cir. 1984). This includes the duty to develop the record as to the medical opinion of the claimant's treating physician. See, e.g. Brown v. Bowen, 827 F.2d 311, 312 (8<sup>th</sup> Cir. 1987); Brissette v. Heckler, 730 F.2d 548, 549-50 (8<sup>th</sup> Cir. 1984); Thorne v. Califano, 607 F.2d 218, 219-20 (8<sup>th</sup> Cir. 1979). Wolfe does not claim that records in existence were not accumulated for the ALJ's review. He claims additional testing and evaluation should have been obtained.

SSR 83-15 sets forth the policy statement applicable to evaluation of claimants with chronic mental impairments. It states, in part, as follows:

The adjudicator must be alert to the particular problems that are often involved in evaluating mental impairments in individuals who have long histories of

repeated hospitalizations or prolonged outpatient care with supportive therapy and high dosages of drugs. A single current examination may not always properly describe an individual's sustained ability to function. It should be viewed as one point in time in the longitudinal picture of an individual impairment. It is vital to review all pertinent information describing the individual's impairment. It is mandatory to attempt to obtain adequate descriptive information from all the sources (both inpatient and outpatient) that are treating the individual currently, as well as those in the past, in order to properly evaluate the severity of the impairment. . . . In addition to obtaining records of treatment from psychiatrists and psychologists, it is important to obtain information from outpatient clinics, community health centers, day care centers, etc.

SSR 83-15, 1983 WL 31245 at \*1.

As to the alleged need to order an additional consultive examination due to the insufficiency of Dr. Smith's evaluation, Wolfe's argument rests on claiming medical and mental testing was needed to pinpoint the diagnosis underlying Wolfe's alleged disabilities. However, for the purpose of deciding if Wolfe is entitled to social security disability benefits, the ALJ's determination rests on whether and to what extent a disability exists and how that disability affects his ability to work, and not on why the disability exists. "The ALJ is required to order medical examinations and tests only if the medical records presented to him do not give sufficient medical evidence to determine whether the claimant is disabled." Barrrett v. Shalala, 38 F.3d 1019, 1023 (8<sup>th</sup> Cir. 1994)(emphasis added). See also Easttam v. Secretary of Health, Ed. and Welfare, 364 F.2d 509, 513 (8<sup>th</sup> Cir. 1966)(affirming denial of benefits where claimant's diminished visual acuity and chest pain were of unknown etiology, though doctor testified that further medical testing may help in delineating the etiology of the chest

discomfort). A claimant can obtain benefits for work-disabling symptoms of unknown origin. See e.g. Turpin v. Bowen, 813 F.2d 165, 168 (8<sup>th</sup> Cir. 1987)(holding benefits may be available for chest pain and leg cramps though the etiology was unknown). Further testing to determine whether Wolfe's symptoms were caused by bipolar disorder or past methamphetamine use was unnecessary in deciding whether Wolfe was, for whatever reason, disabled.

Dr. England testified that if Wolfe's complaints of memory problems and confusion are important, then standardized IQ and memory testing may be advisable. Dr. England questioned Wolfe at the hearing to determine if such tests were performed but not included in the record, and based on Wolfe's answers, concluded the tests were never administered. The question is, therefore, whether IQ and memory tests were requisite steps in determining if Wolfe has disabling memory impairments.

A review of Wolfe's record reveals memory loss or low IQ were never identified as impairments that would keep him from performing work. Wolfe's psychological evaluation for Valley Hope treatment states he received an IQ score "within a range that would suggest that he would benefit from having the program at Valley Hope presented to him in a simple and concrete manner." AR 175. The Mental Capacities Evaluation by Dr. Skoch states Wolfe has no limitations in ability to understand, remember, and carry out short and simple instructions, and that he is not significantly limited in his ability to carry out detailed instructions. AR 241. Wolfe's complaints of memory problems were never raised to his physicians or the physician assistants they supervised, and were first raised with his counselor, Ms. White, on February 28, 2005. According to that record, Wolfe told Ms. White he chose making donuts over baking bread at Wal-

Mart because "there were too many things to remember about . . . the different breads and he did not think that his memory was that good." AR 258. He voiced concern about keeping his job during his March 7, 2005 appointment, stating "My memory is just not good. I cannot remember a lot of the things they test on." AR 256. On the day he quit his position at Wal-Mart, he reported to Ms. White that he was overwhelmed by all the things Wal-Mart required him to remember. AR 262. However, Ms. White's June 6, 2005 letter to Wolfe's counsel notes Wolfe was anxious and fearful that he would be unable to pass Wal-Mart's required tests, but it does not specifically identify memory loss or low IQ as the reason Wolfe quit his job at Wal-Mart. AR 248.

Wolfe's mental care treatment focused on treating his depression and anxiety. Wolfe himself testified that despite his difficulty with concentration and memory, he can follow simple one- or two-step instructions. AR 303-04. In accordance with Wolfe's testimony, and lending ample credence to the statements of his treating physician and counselor, the ALJ's hypothetical question asked the vocational expert to assume Wolfe could understand and carry out simple instructions but not detailed instructions. Even with this restriction, the vocational expert testified Wolfe was able to be gainfully employed. An ALJ is permitted to issue a decision without obtaining additional medical evidence so long as other evidence in the record provides a sufficient basis for the ALJ's decision. Haley v. Massanari, 258 F.3d 742, 749-50 (8<sup>th</sup> Cir. 2001). The ALJ was not required to pursue additional evaluations, memory or IQ testing of Wolfe before reaching his determination.

3. Failure to Properly Assess the Wolfe's Credibility.

Wolfe argues that the ALJ simply stated that plaintiff's testimony "was not credible," (AR 20), and failed to properly consider or discuss the factors set forth in Polaski v. Heckler, 739 F.2d 1320, 1322 (8<sup>th</sup> Cir. 1984).

Contrary to Wolfe's argument, the ALJ did not conclude Wolfe's claim and testimony lacked any credibility. The ALJ held:

[T]he Claimant's medically determinable impairments could reasonably be expected to produce the type of symptoms described during the course of his testimony. . . . [I]t must now be determined whether the Claimant experiences such symptoms in such intensity, and of such frequency and duration, as would preclude all types of substantial and gainful work activity.

AR 19. The ALJ ultimately concluded that Wolfe's testimony, "insofar as it pertained to the inability to perform virtually any type of work activity on a sustained basis, was not credible." AR 20.

To assess a claimant's credibility, the ALJ must consider all of the evidence, including prior work records and observations by third parties and doctors regarding daily activities, the duration, frequency, and intensity of subjective symptoms, precipitating and aggravating factors, the dosage, effectiveness, and side effects of medication, and functional restrictions. Lowe v. Apfel, 226 F.3d at 971-72 (citing Polaski v. Heckler, 739 F.2d 1320, 1322 (8<sup>th</sup> Cir. 1984)). The ALJ may not discount a claimant's complaints solely because they are not fully supported by the objective medical evidence, but the



complaints may be discounted based on inconsistencies in the record as a whole. Id. at 972. The ALJ is not required to discuss methodically each Polaski consideration, so long as the ALJ acknowledges and examines those considerations before discounting the subjective complaints, (id.(citing Brown v. Chater, 87 F.3d 963, 966 (8<sup>th</sup> Cir. 1996))), and makes "express credibility findings," and "explain[s] the record inconsistencies that support those findings." Dolph v. Barnhart, 308 F.3d 876, 879 (8<sup>th</sup> Cir. 2002).

The ALJ's opinion discussed Wolfe's prior work history, the medical reports of his treating physicians and counselor, his ability to work at Wal-Mart for a period of time, and his response to treatment medication. The report states that based on the information outlined in this discussion, the ALJ concluded that Wolfe's claim that he was unable to work at any job was not credible.

Specifically, the ALJ noted that prior to treatment for polysubstance abuse, primarily a methamphetamine addiction, Wolfe was able to work. When he entered substance abuse treatment, his GAF was only 38. However, "[s]ince becoming sober with the help of attendance at narcotics anonymous meetings, counseling and starting medication for depression and anxiety, his Global Assessment of Functioning has gone from 38 to 55 indicating improvement to the point that he could sustain employment." AR 19. The ALJ noted that Wolfe did, in fact, get a job at Wal-Mart, but acknowledged that the Wal-Mart employment was not a good job for Wolfe because of the fast pace, early morning hours, repeated testing, and constant contact with people. The ALJ further noted that Dr. Skoch had indicated Wolfe needed slow paced work--he could occasionally work at a rapid pace and could

continually perform work at a slow pace. The ALJ disregarded the records of Ms. White, citing inconsistencies within those records, and explained that Dr. Smith, the consulting mental health evaluator, concluded that Wolfe's depression and anxiety disorders are controlled by medication. AR 19. Wolfe had reported to Dr. Smith that his symptoms were managed fairly well with medication, (AR 185), and as noted by the ALJ, Wolfe predominant side effect from these medications is "cotton mouth." AR 18. The ALJ acknowledged that Wolfe's concentration and work ability are negatively effected by stress, but further noted that according to Dr. Skoch, Wolfe remains able to understand, remember and carry out simple instructions. AR 20. Based on the foregoing, the ALJ concluded the record did not support Wolfe's claim that was unable to perform any type of work on a sustained basis.

I conclude the ALJ's determination sets forth clear and express credibility findings with respect to Wolfe's claims, and has sufficiently explained the record inconsistencies that support these credibility findings. The ALJ's determination is not subject to reversal for failing to correctly apply the Polaski factors.

IT THEREFORE HEREBY IS ORDERED: The decision of the Commissioner of the Social Security Administration is affirmed. Judgment in accordance with this memorandum and order will be entered by separate document.

DATED this 22<sup>nd</sup> day of February, 2007.

BY THE COURT:

s/ *David L. Piester*

David L. Piester  
United States Magistrate Judge